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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 YAAKOV LICCI, et al.,

4 Plaintiffs,

5 v.

08 CV 7253 (GBD)

6 AMERICAN EXPRESS BANK LTD., et  
7 al.,

8 Defendants.  
-----x

9 New York, N.Y.  
10 November 4, 2014  
11 10:16 a.m.

12 Before:

13 HON. GEORGE B. DANIELS,

14 District Judge

15 APPEARANCES

16 THE BERKMAN LAW OFFICE, LLC  
17 Attorneys for Plaintiffs  
18 BY: ROBERT TOLCHIN

19 DLA PIPER LLC  
20 Attorneys for Defendants  
21 BY: JONATHAN D. SIEGFRIED  
22 JOSHUA D. ARISOHN

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1 (Case called)

2 THE COURT: Good morning. Let me first address the  
3 letter that I received, Mr. Siegfried, with regard to your  
4 position as to collateral estoppel. Give me an idea where you  
5 think you want to go at this point. I have your letter. I  
6 don't have a response from Mr. Tolchin. And then I think you  
7 also asked if you could make a motion.

8 What I would anticipate doing is giving Mr. Tolchin  
9 first an opportunity to respond to your letter by letter.  
10 After that response, if a motion is appropriate, then I'll let  
11 you file a motion letter and respond to the motion.

12 My position would be this. If there is no genuine  
13 meritorious opposition to your claim, then I may consider  
14 imposing costs if you have to do motions on Mr. Tolchin and his  
15 client if it's real obvious that these issues have already been  
16 addressed and this has just been dressed up and the names have  
17 been changed to restate the same claim that's already been  
18 adjudicated. But if there's a legitimate response, a colorable  
19 response, then we'll go to full-blown motion practice and we'll  
20 address that issue and see where we go from there.

21 Is there anything else you want to add before I hear  
22 from Mr. Tolchin?

23 MR. SIEGFRIED: Well, yes, your Honor. I think that  
24 when Mr. Tolchin does respond, there is another matter that he  
25 ought to address.

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1           Since sending you the letter that we did, we did some  
2 further research and, in fact, there is another case that he  
3 filed, *Kaplan v. Al Jazeera*. This was before Judge Wood. It  
4 is the same plaintiffs. It is an aiding and abetting claim  
5 alleging violations of the ATA and ATS. The first amended  
6 complaint that he filed was dismissed by her, although on  
7 different grounds than Judge Lamberth did.

8           There was then a second amended complaint. A motion  
9 to dismiss was filed by Al Jazeera in that case. And after the  
10 Court gave him two extensions to respond to that and said if I  
11 don't get a response shortly, I'm going to dismiss it,  
12 apparently, Mr. Tolchin withdrew that complaint.

13           So there is at least one other action in that one, I  
14 would say, particularly with respect to the ATS claim, Judge  
15 Wood followed the Second Circuit *Kiobel* decision and dismissed  
16 on the corporate liability grounds.

17           So there are at least two cases, although I think the  
18 case in D.C., you've read our letter so you know our argument  
19 there. But there is at least a second case. And whether there  
20 are others, I don't know, but we'll continue to look.

21           THE COURT: So, Mr. Tolchin, what's the most efficient  
22 way to resolve this?

23           MR. TOLCHIN: I'm happy you asked me that question,  
24 your Honor, because I find the letter that was submitted to be  
25 despicable personally, professionally offensive, and completely

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uncalled for. If there's a case out there that he says has an implication, argue that. He doesn't have to bring up that 20 years ago I was late filing a brief in 1994. What that has to do with this case I don't know. So I'm happy that you asked me, your Honor, what's the most efficient way to proceed.

Obviously, I think you should probably predict, I disagree that the *Kaplan* case in Washington from Judge Lamberth disposes of this case. It may, but not necessarily, but it may dispose of certain claims in this case. I'm not sure that's even completely correct. But it doesn't dispose of this case in toto for the main reason that this case asserts claims that were not addressed by Judge Lamberth.

Judge Lamberth disposed of the ATA claim and the ATS claim, yes. But as to the common law, the nonfederal claims, he simply said that since I have no federal causes of action, I am exercising my discretion and I'm not going to exercise supplemental jurisdiction over those claims.

THE COURT: But my recollection is in this case you had more than nonfederal claims.

MR. TOLCHIN: That's correct, your Honor.

THE COURT: You have similar claims, ATS and similar federal claims that they said were disposed of.

MR. TOLCHIN: Right. So let me just step back just for the big picture. This case began in state court. It was removed to this court by the defendants. After they removed

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1 it, we amended the complaint to add the ATS and ATA claims.  
2 Even if -- and I'm putting that in italics and underlined --  
3 even if your Honor would dispose of the ATS and ATA claims  
4 along the lines of Judge Lamberth's ruling -- and I'll come to  
5 that ruling in a minute -- we would still have those nonfederal  
6 claims in this case.

7 THE COURT: I'm first trying to figure out whether  
8 you're going to dispose of those claims.

9 MR. TOLCHIN: Of which claims?

10 THE COURT: The federal claims.

11 MR. TOLCHIN: The ATS claim, the answer is probably  
12 yes. The ATA claim, I think we can still amend it. What's  
13 interesting -- I said I'd come back to Judge Lamberth's  
14 decision -- Judge Lamberth's decision on the ATA claim was  
15 quite interesting. It's an outlier. He admits it straight up.  
16 He says I know that other judges have disagreed with my  
17 holding, but I disagree with them.

18 So your Honor has ruled in the past, I believe, in the  
19 Sokolow case. Judge Hellerstein in the Lelchuk case just  
20 recently on July -- it's not as recent as I thought. On  
21 July 18, 2011, Judge Hellerstein ruled that Hezbollah, a  
22 nonstate actor called Hezbollah in Lebanon shooting missiles  
23 into Israel at civilians was not considered an act of war.  
24 Judge Hellerstein said there's no act of war here. There never  
25 was a declared war between Hezbollah and the United States.

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1 It's like a fungus grown in Lebanon, but it's not a state and  
2 there's no war between Hezbollah and the United States and goes  
3 on from there.

4 There's four or five other cases, some of which are  
5 acknowledged by Judge Lamberth. He simply disagrees. So what  
6 we have here is Judge Lamberth made a ruling on what's a pure  
7 issue of law, not a factual determination, just a pure issue of  
8 law.

9 And I think if we come to briefing the law of  
10 collateral estoppel, we're going to be able to persuade your  
11 Honor that where there's a disagreement between two courts on a  
12 pure issue of law, especially if it's two different courts,  
13 this Court in the Second Circuit is not required to follow  
14 Judge Lamberth's holding on a pure issue of law and this Court  
15 can consider it itself.

16 THE COURT: Well, my initial reaction would be is what  
17 I'd be more interested in is not a general scenario of whether  
18 or not I and other courts are in general addressing a similar  
19 issue and taking different positions, but whether or not your  
20 clients, who are the same parties in both litigation, having  
21 their day in court and litigating that issue individually,  
22 whether your clients are bound by that determination. That's a  
23 different issue.

24 MR. TOLCHIN: For sure.

25 THE COURT: That's a more significant issue.

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1 MR. TOLCHIN: I recognize that issue.

2 THE COURT: You can't go around to every court and try  
3 to find one you like.

4 MR. TOLCHIN: Right. I recognize that and I will  
5 acknowledge it's a fascinating issue.

6 THE COURT: Not so fascinating for me. I want to  
7 resolve it and move on.

8 MR. TOLCHIN: But you asked me at the beginning what  
9 do I think is the most efficient way to proceed.

10 THE COURT: Okay.

11 MR. TOLCHIN: Now, I have one option. I could stand  
12 here and say they're going to file a motion, it's going to come  
13 down the pike. And after they get their motion, I will try to  
14 cure whatever they say in their motion.

15 THE COURT: I don't want to make them file a motion  
16 and have you say to me you know what, Judge, they're right. I  
17 wouldn't put them to that expense. And I wouldn't. I'd put  
18 you to that expense.

19 MR. TOLCHIN: What I would like to do, most efficient  
20 way to proceed, what I would like to do is file an amended  
21 complaint. Whatever I'm going to drop, I'm going to drop.  
22 Whatever I'm going to beef up, I'm going to beef up. And,  
23 frankly, there's a whole lot to beef up because, as you saw in  
24 the other letter, the one with the exhibit tabs I saw your  
25 Honor has, since this case was dismissed on jurisdictional

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1 grounds -- and it had quite an odyssey. I don't know if you  
2 followed it.

3 This case went to the Second Circuit, the Court of  
4 Appeals, and back to the Second Circuit. And it sat in limbo  
5 for like a year, which I truly don't understand what was going  
6 on there. Then it finally came back here. But in that --  
7 let's see. It was dismissed by your Honor on March 31, 2010,  
8 and the mandate was issued August 28, 2014. So during that  
9 almost four-year travel, the big things happened at Lebanese  
10 Canadian Bank.

11 THE COURT: The American Express part too was also --  
12 I don't want to make it sound like the circuit was doing  
13 nothing. The American Express defendant was a separate issue  
14 for the circuit.

15 MR. TOLCHIN: One day I'll figure it out. But we made  
16 a motion in the Second Circuit to bifurcate the case. Since  
17 they made two different decisions, we said we understand you're  
18 still thinking about that one, so send this one back. They  
19 denied that. I never understand it.

20 THE COURT: Do you want to do this. I mean if that's  
21 what you want to do, I propose that you do this. Within the  
22 next 30 days, you respond to their letter with or without a  
23 proposed amended complaint. If you're going to concede certain  
24 claims, then I know that those are put aside and I don't have  
25 to deal with it. If you're going to propose an amended

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1 complaint which has some if not all or all of the claims, then  
2 your response will be that you think these are appropriate and  
3 it's an appropriate response and why you should be allowed to  
4 amend it in that way, then I'll consider that. And then I'll  
5 let them respond to that letter and we'll address it.

6 MR. TOLCHIN: I'm with you most of the way on that,  
7 your Honor. You asked for the most efficient way. I think  
8 this letter that they sent the other day accusing me of  
9 misconduct and claiming that a brief I was late on in 1994 --

10 THE COURT: You don't have to address those unless you  
11 feel compelled to simply -- I'm concerned about the substantive  
12 issues.

13 MR. TOLCHIN: I'd like to be bigger than what's  
14 frankly stupidity.

15 THE COURT: Why don't you address the substantive  
16 issues they raise with regard to the D.C. case. And if you  
17 think an amendment is appropriate in response to that, then you  
18 can propose the amendment.

19 MR. TOLCHIN: Can I make an even more efficient  
20 proposal. Let me just serve my amended complaint.

21 THE COURT: No. I want you to respond to their letter  
22 saying that this case should be dismissed for collateral  
23 estoppel reasons. I want a letter responsive to this letter in  
24 any event.

25 MR. TOLCHIN: Okay. Once I've amended the complaint,

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1 what they're talking about stops being the subject.

2 THE COURT: If you say I'm amending the complaint by  
3 dropping the claims they're complaining about, then you need  
4 not make a further argument. I don't need a further  
5 substantive argument.

6 MR. TOLCHIN: But if I amend the complaint in a way  
7 that simply, for lack of a better word, beefs up the claims.

8 THE COURT: You're still going to have to address  
9 whether or not it's collateral estoppel because that doesn't  
10 change that issue. Whether you have a beefed up collateral  
11 estoppel case or you have a watered down collateral estoppel  
12 case, it doesn't matter. You've got to tell me in any event in  
13 this response as succinctly as you can why you're not precluded  
14 from filing any complaint based on those claims.

15 MR. TOLCHIN: I see your point, your Honor. The only  
16 thing is when I do that, I'll be saying here's my amended  
17 complaint and I'll be arguing about why this is good without  
18 the benefit of hearing why they say it's bad.

19 THE COURT: No. They say it's bad because they say no  
20 matter what complaint you file, you can't bring these claims  
21 here again because you brought those claims someplace else and  
22 those claims were dismissed. You had your day in court on  
23 those claims and you lost. You're going to have to address  
24 that anyway.

25 MR. TOLCHIN: Sure. So I'm happy to do that. But I'd

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1 like to come back to the fact that no matter what -- ATA claim,  
2 no ATA claim, ATS claim, no ATS claim -- some part of this case  
3 is going forward. The nonfederal claims are going forward.

4 THE COURT: Then that should be your response.

5 MR. TOLCHIN: Your Honor doesn't have the luxury that  
6 Judge Lamberth had. Judge Lamberth could say nonfederal claims  
7 dismissed. I'm not exercising my supplemental jurisdiction.  
8 In the case of this Court, the nonfederal claims are not here  
9 based on supplemental jurisdiction, you know, pendent from  
10 federal claims. They're here because they were asserted in  
11 state court and the defendants removed it.

12 THE COURT: I understand.

13 MR. TOLCHIN: So your Honor could I suppose send the  
14 case back to state court, but dismissal is not an option.

15 THE COURT: It depends. That's not necessarily so.  
16 My option is the same option as Judge Lamberth.

17 MR. TOLCHIN: No, it's not.

18 THE COURT: It is because Judge Lamberth did not  
19 dismiss the nonfederal claims. He dismissed the federal  
20 claims. I have the same option to dismiss the federal claims  
21 with prejudice and to either dismiss or remand the state claims  
22 to state court without prejudice.

23 MR. TOLCHIN: You don't have the option to say I'm  
24 declining to exercise jurisdiction over the nonfederal claims.

25 THE COURT: Why don't I have that option?

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1                   MR. TOLCHIN: Because this case came from state court  
2 where there was jurisdiction without any question. And your  
3 Honor has the option, I agree, to remand it to state court.

4                   THE COURT: Not necessarily. I don't know, in looking  
5 at the papers and looking at your response, I don't know if  
6 this case should not have been removed at all given Judge  
7 Lamberth's decision. I don't know what the timing was with  
8 Judge Lamberth's decision. If you want to make that argument,  
9 that's fine. You may convince me that's the case. But I need  
10 to hear the argument. If you are already precluded by  
11 collateral estoppel with regard to the federal claims --

12                  MR. TOLCHIN: Lambert's decision was years later.  
13 This case did not exist when Lambert made his decision. Kaplan  
14 wasn't even filed until 2010.

15                  THE COURT: The only issue before me right now is  
16 whether or not those claims that Judge Lamberth dismissed are  
17 claims that are dismissed for all purposes for all time against  
18 your clients because your clients shouldn't be able to now pick  
19 and choose and try to find another forum to bring the exact  
20 same federal claims that Judge Lamberth dismissed on their  
21 merits and with prejudice.

22                  MR. TOLCHIN: By the way, it's not the same exact  
23 claim because completely different defendant.

24                  THE COURT: Right.

25                  MR. TOLCHIN: And I assume you're referring to the

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1 claims he dismissed on the substance, not the ones where he  
2 declined to exercise supplemental jurisdiction.

3 THE COURT: That's true. He made no determination  
4 with regard to the ones he declined supplemental jurisdiction.

5 MR. TOLCHIN: As to those cases, as to those claims,  
6 the reason I bring up that it's either going to proceed here or  
7 it's going to proceed in state court is the operative verbal  
8 phrase it's going to proceed in some form. So I'd like to  
9 start discovery.

10 THE COURT: As you say, I'm at a disadvantage. You  
11 know all of this; I don't. You know what the basis for your  
12 legal and factual argument is but I don't because I don't have  
13 a response to this letter. So why don't you give me the  
14 appropriate response to this letter so I can be informed and  
15 make the same judgment that you're making that the amended  
16 complaint that you want to attach with it solves all your  
17 problems and you should be able to proceed on the amended  
18 complaint as is. And if they say, well, yeah, he gave up this  
19 claim but he should have given up this one too, then they can  
20 respond to that and they can say that and I can make a  
21 determination of whether or not the amended complaint as you've  
22 alleged and the claims you say you want to proceed on are not  
23 precluded.

24 MR. TOLCHIN: I just want to clarify something, a  
25 different point. I brought up all this stuff about a late

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1 brief from 20 years ago.

2 THE COURT: I had forgotten until you reminded me  
3 three times.

4 MR. TOLCHIN: In this letter he also claims that  
5 somehow I committed misconduct by not telling your Honor about  
6 Kaplan even though the only communication I had with this Court  
7 since the mandate was issued was a letter dated September 9  
8 saying, Judge, please schedule a conference. And the same day  
9 he submitted a letter to the Court telling the Court about  
10 Kaplan. So I don't know what -- his September 9 letter cites  
11 Kaplan. So I don't know what the accusation here is. But I  
12 just want to be clear when your Honor says don't mention all  
13 that stuff that you mean don't mention that too.

14 THE COURT: It's relevant to my determination whether  
15 or not your case should be dismissed.

16 MR. TOLCHIN: Dismissed or not dismissed, I understand  
17 that. But I'm either going to respond to the allegations of  
18 misconduct, or we're just going to put that behind us and say  
19 we're talking about the merits.

20 THE COURT: You know, unless I'm going to address some  
21 pending motion for some additional sanction and you want to  
22 respond to that, that's fine. But right now I'm only  
23 interested in moving forward on the substantive issue and  
24 deciding whether or not the basis on which they say your  
25 clients are precluded from re-litigating this claim against any

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1 bank if you lost on the merits of liability with regard to any  
2 bank.

3 MR. TOLCHIN: I got that. In the meanwhile while this  
4 is going on, can we serve discovery demands as to the  
5 nonfederal claims?

6 THE COURT: Not before I get an amended complaint. If  
7 you're going to give me an amended complaint, I'm going to say  
8 no.

9 MR. TOLCHIN: Okay.

10 THE COURT: Give me as quickly as you want an amended  
11 complaint. I'll resolve this as quickly as I can get a  
12 response from you. And if you tell me when you want to  
13 respond, we can figure out when discovery is going to be ready  
14 to go. How quickly are you going to give me?

15 MR. TOLCHIN: Thirty days seems to be the fashionable  
16 time frame.

17 THE COURT: So I'll expect a response and/or proposed  
18 amended complaint let's say on or before Friday, December 5.

19 MR. TOLCHIN: Can we just make it the Monday after  
20 that?

21 THE COURT: December 8.

22 MR. TOLCHIN: Yeah.

23 THE COURT: And why don't I give two weeks for  
24 response. So say by December 22. And I'll review the papers  
25 and why don't I put it down for January 6. I'll see you on

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1 January 6 and we can address it further if I need to hear  
2 argument on it. Either you'll resolve it or I'll resolve it  
3 before that date.

4 MR. TOLCHIN: I'm just going to check the 6th and make  
5 sure I don't have a conflict.

6 THE COURT: 6th at 10:30.

7 MR. TOLCHIN: It says that's the day I'm supposed to  
8 give my associate a raise. Other than that --

9 THE COURT: Bring him to court. Let's do it that way.  
10 Is there any other way you want to proceed other than that?

11 MR. TOLCHIN: What was his date for response, 12/22?

12 THE COURT: Yes.

13 Mr. Siegfried, do you have any other suggestion at  
14 this point?

15 MR. SIEGFRIED: No. That's fine, your Honor.

16 THE COURT: Let's proceed that way. I'll look at the  
17 response as soon as I get it. I'll look at the amended  
18 complaint. I'll let them respond to that, and then we can  
19 discuss it on the 6th.

20 MR. TOLCHIN: What time on the 6th?

21 THE COURT: 10:30.

22 MR. SIEGFRIED: Your Honor, maybe we could have at  
23 least Mr. Tolchin tell us whether apart from the two other  
24 actions that we now know of whether there were any other  
25 actions that he filed on behalf of these plaintiffs so that

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1 we're not playing a cat and mouse game here.

2 MR. TOLCHIN: Your Honor, I don't even understand that  
3 question because there's a thing called the U.S. party case  
4 index which is part of PACER and you can put in any plaintiff's  
5 name and find any case they filed in the country. So there's  
6 no secret here. Maybe what we have here is Mr. Siegfried  
7 didn't look, but there's no secret. PACER is completely  
8 public.

9 THE COURT: Why don't you do this. I want you to give  
10 him either separately or at the same time, and a copy to the  
11 Court, a letter which outlines all of the cases that your  
12 clients are plaintiffs in that raise these similar claims.  
13 Just give him a list of cases.

14 MR. TOLCHIN: That's also by the 8th?

15 THE COURT: On or before the 8th.

16 MR. TOLCHIN: Simultaneously with everything else.

17 THE COURT: Either simultaneously with everything  
18 else, but, you know, if it's like four cases and you just want  
19 to send him a letter tomorrow, send him a letter tomorrow and  
20 put that aside. But no later than the 8th of December, okay,  
21 so we can address it. I can make an informed judgment.

22 MR. TOLCHIN: I had one more sort of ground rule  
23 question.

24 THE COURT: Yes.

25 MR. TOLCHIN: I was shocked, as you can tell, by this

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1 letter.

2 THE COURT: Very little shocks me.

3 MR. TOLCHIN: You're older than me. I was also  
4 shocked that in his letter he says that he had been planning to  
5 just raise this at the conference, which I apologize there was  
6 a scheduling error about the October 16 conference. But now he  
7 just raised another issue he brought up out of the blue.

8 THE COURT: Which one?

9 MR. TOLCHIN: About he wants to know whether there's  
10 other cases out there. It's a fair question, but I'm upset  
11 about the procedure. There's supposed to be meeting and  
12 conferring. If he thought the *Kaplan* case created a collateral  
13 estoppel, he knows my phone number. He should have called me  
14 up and talked it over before writing to the Court and certainly  
15 before intending to come into the court just with a sandbag,  
16 raise an issue at a conference. That's not how things are  
17 supposed to work here.

18 THE COURT: I always encourage that communication  
19 prior to coming to the Court.

20 MR. TOLCHIN: Thank you.

21 THE COURT: So you think there's any further  
22 communication that you two of you have, as I always indicate,  
23 I'm not a translator or interpreter for lawyers to talk to each  
24 other. And let's just get this done so I can make a judgment  
25 and I can move forward efficiently. Anything further?

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MR. SIEGFRIED: No, your Honor. Although, again, we were here for the last conference. Mr. Tolchin was not. Apparently your clerk told us she attempted to contact him. And so we came here without any excuses from Mr. Tolchin or courtesy of telling us he wasn't going to show up. So I hear his outrage, but perhaps he might consider his own actions in that regard. But I thank you.

THE COURT: Let's move forward, not backwards. I want to resolve the merits and substance of these issues rather than going back and forth on these issues.

MR. SIEGFRIED: Thank you, your Honor.

MR. TOLCHIN: And I did contact your Honor's clerk, your Honor, and apologized. What had happened, it was scheduled for the 16th but it was mistakenly diaried for the date under that on the calendar, which I think was the 23rd. And, in any event, the reason nobody could reach me was the 16th was a Jewish holiday. My office was closed. And I apologize. It was a calendar mistake.

THE COURT: I accept your apology. See you on the next date.

oo